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No. 80-2043

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26 *et al.*
*Petitioners,*

v.

STEVEN A. PICO, ETC. *et al.*
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND FOR THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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## MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND BY THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO

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The American Federation of Labor and Congress of Industrial Organizations and the American Federation of Teachers, AFL-CIO, respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of the position of the respondents in this case.

The AFL-CIO is a federation of 102 national and international unions having a total membership of 14,500,-

000 working men and women. The American Federation of Teachers is the representative of over 500,000 of those men and women, the majority of whom are employed at schools and other educational institutions.

This case raises novel and important issues concerning the application of the First Amendment to the schools. The American Federation of Teachers in particular and the labor movement in general have long been dedicated to advancing the cause of public education as the preeminent means of advancing our democracy and our endeavor to achieve a civilized, harmonious and prosperous society. The question presented here as to the power of school boards to limit the role of the schools as the site of free inquiry goes to the very essence of the educational enterprise in this Nation. The AFL-CIO and the American Federation of Teachers therefore seek this opportunity to express their views on that question.

## CONCLUSION

For the above stated reasons this motion for leave to file a brief *amici curiae* should be granted.

Respectfully submitted,

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**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND FOR THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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This brief *amici curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* in this case is set forth in that motion.

## ARGUMENT

The following question is, we believe, the only one before this Court for decision: Are there *any* factual circumstances which would support a claim that removal of books from a secondary school library on the basis that their content is somehow objectionable for secondary students violates the First Amendment rights of the objecting students?

We formulate the question presented in that fashion for two reasons. The first is the procedural posture of the case. This matter comes to this Court from a court of appeals decision reversing a grant of summary judgment in favor of defendants (hereafter "the School Board") and remanding for trial. Pet. App. 33. The district court had granted summary judgment on the basis that, except, perhaps, for religious grounds, school officials may remove books from school libraries "'for whatever reason'" without implicating First Amendment concerns. Pet. App. A-10. Indeed, only such an absolutist legal theory could properly support a grant of summary judgment. As Judge Newman's concurring opinion in the court of appeals ably demonstrates, there was a conflict in the evidence as to the *reason* the books were removed; with substantial evidence tending to support plaintiffs' allegations that the School Board acted to advance certain political views. Pet. App. A-75-77, A-79.[1]

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[1] The School Board has argued that its action was based on its view that the removed books contain unacceptably vulgar language and overly explicit sexual references. Pet. App. A-55. We note that the selection which at least in part caused the removal of "A Reader for Writers"—Jonathan Swift's *A Modest Proposal for Preventing the Children of Poor People in Ireland from Being a Burden to their Parents or Country*—in keeping with eighteenth-century English diction does not use "vulgar" words or descriptions presaging *Lady Chatterley's Lover*. Moreover, the *Modest Proposal* has been read for generations as the preeminent example in the language of the use of irony as a literary device for conveying political and social views. That the essay was banned in the

And the generally high literary stature of the books removed, as well as the circumstances of their removal (see Pet. App. A-16-18; A-27-29), make it plain that judgment could be entered for the School Board only if school boards may remove *any* book from the shelves of *any* secondary school library for *any* reason through *any* irregular procedure and with *any* sort of accompanying publicity.

There is a second related reason for viewing the question for decision here as similar to one arising on a motion to dismiss for failure to state a claim. The question whether and under what circumstances school boards

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apparent belief that it in fact advocates child-slaughter is itself an irony; Swift, of course, assumed that no literate person would so read his work, but rather that all would understand that his purpose was precisely by conveying the abhorence of such a plan to condemn the policy of the English government toward Ireland.

Further, even if it is assumed that the Board's avowed reason was the animating consideration and that some uses of language short of actual obscenity would justify total exclusion from a high school library (see *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 742 *et seq.*)—a question upon which we express no view except to note that the key considerations in *Pacifica*, the nature of the medium and the possibility that "children . . . too young to read" will be affected (*id.* at 725-726, *id.* at 757-758 Powell, J., concurring), are not here present—those two circumstances would not, as Judge Mansfield suggested below, justify summary judgment. To paraphrase the plurality opinion in *Pacifica* "[i]f there were any reason to believe that the [School Board's] characterization of the [books] as offensive could be traced to [their] political content—First Amendment protection might be required." *Id.* at 746; *see also Mount Healthy School District* v. *Doyle*, 429 U.S. 274. The question whether any or all of these books would have been excised absent objection to their ideas, as understood or misunderstood by the members of the School Board, is one which the documentary evidence elicited upon summary judgment is entirely inadequate to resolve. In particular, it would be relevant to this question to know whether or not other books with similar language were left on the shelves after the purge; if so, as Judge Newman recognized "the inference will be strengthened that vulgarity was the excuse, not the reason, for book removal." Pet. App. A-76.

may excise books of recognized literary value from secondary school libraries is one of increasing contemporary concern. *See, e.g.*, New York Times, December 13, 1981, Book Review Section, p. 1. Moreover, this Court's First Amendment decisions concerning the educational offerings of public schools, as opposed to the right of the students themselves to speak or refrain from speaking, have turned on Religion Clause objections. *Epperson* v. *Arkansas*, 393 U.S. 97; *Abington Township* v. *Schempp*, 374 U.S. 203; *Engel* v. *Vitale*, 370 U.S. 421; *Stone* v. *Graham*, 449 U.S. 39. The Court has *never* addressed directly questions concerning the shaping of library collections generally, or of those of school libraries particularly. Further, the problem in this case implicates several nascent strains of general First Amendment doctrine, among them the tailoring of First Amendment principles to governmental action affecting juveniles (*e.g. Pacifica Foundation, supra*; *Tinker* v. *Des Moines School District*, 393 U.S. 503), and the application of the general proscription against content-based discrimination to situations in which governmental control of a means of communication may be deemed to justify differentiations based on content (see *Widmar* v. *Vincent*, —— U.S. ——, 50 L.W. 4062, 4066 (Dec. 8, 1981) (Stevens, J. concurring).

The circumstances just canvassed counsel caution in constitutional adjudication. *See, e.g. Rescue Army* v. *Municipal Court*, 331 U.S. 549. Indeed, in the brief in opposition to the petition for a writ of certiorari ("Opp. Br."), respondents, based their opposition precisely on the ground that "sound and responsible constitutional adjudication can only profit from a full and fair exposition of the factual ingredient to the controversy." Opp. Br. at 17, citing such cases as *Rescue Army* and *Minnick* v. *California Department of Corrections*, —— U.S. ——, 49 L.W. 4609 (June 1, 1981). In support of this argument against hearing the case at this time, respondents suggested eight categories of evidence that

might be developed at trial and that might well be relevant *if* a line between constitutional and unconstitutional library book removals in the school context were to be drawn. *Id.* at 11 n.*. By granting the writ, this Court evidently decided that despite the absence of such potentially relevant material from the record, the case in its present posture presents a major threshold constitutional question with sufficient clarity to merit this Court's first intervention in this sensitive area. That question, we submit, is whether the role of school boards in running school libraries is such that the First Amendment has *no* application whatever to the decisions made with respect to those libraries. It is to that question that this brief is addressed.

A

This case is not one which can be usefully approached on the basis of slogans. It is of no aid to analysis of the issue at hand to proclaim that a "principal function of all elementary and secondary education is indoctrinative" (*James* v. *Board of Education*, 461 F.2d 566, 573 (2nd Cir. 1972), *quoted* in appellants' brief (hereafter "App. Br.") at 16), or that "the concept of a book acquiring tenure by shelving is indeed novel . . . under any theory of constitutional law. . ." (*Presidents Council, District 25* v. *Community School Board*, 457 F.2d 289, 293 (2nd Cir.), *cert. denied*, 409 U.S. 998, (1972), quoted by Judge Mansfield in this case, (Pet. App. A-64). While these aphorisms have about them a nice ring as well as an element of truth, in the end they are as inadequate as doctrine as regards the issue presented here as Justice Holmes' pithy formulation—"The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman" (*McAuliffe* v. *New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 518)—proved to be with respect to the question whether a public employee may be discharged because of an exercise of First Amendment rights. *See, e.g., Garrity* v. *New Jersey*, 385 U.S. 493, 499-500; *Keyishian* v. *Board of Regents*, 385

U.S. 589, 605-606. Just as his approach—which to a large degree paralyzed thinking with regard to the question it addressed for two generations—erred essentially by putting the question the wrong way around, so do the mottoes recited here on behalf of an unbounded power of school officials to purge the library shelves.

To say that schools have an "indoctrinative" function, for example, simply means, to the extent that it is valid and useful observation, that the very purpose of education, and the reason which justifies compulsory education laws, is to communicate to the young the knowledge, ideas, and modes of thinking which have been developed in the past; there is nothing inherent in the function of schools, however, which requires that the educational authorities be allowed to "indoctrinate" by any means whatever or on any subject whatever, and this Court has rejected the view that there is such a sweeping authority. *Epperson* v. *Arkansas*, *supra*; *Board of Education* v. *Barnette*, 319 U.S. 624, 631. Thus, in *Barnette* the Court recognized that "the state may 'require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guarantees of civil liberty, which tend to inspire patriotism and love of country.'" *Id.* at 631, *quoting Minersville School District* v. *Gobitis*, 310 U.S. 586, 604 (Stone, J., dissenting). But the *Barnette* Court rejected the view that the appropriateness of the goal of "inspir-[ing] patriotism and love of country" insulated from constitutional scrutiny means of doing so in no way typical of or essential to the educational process:

> Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here in whether this slow and easily neglected route to aroused loyalties may be shortcut by substituting a compulsory salute and slogan. [*Id.* at 63.]

*Barnette*, to be sure, concerned government compulsion of speech by the students themselves. Moreover, since the flag salute was not claimed to have educational value in the sense of developing analytic faculties or communicating knowledge (*id.* at 624 n. 12), ideological conformity was the only possible purpose of the exercise. And the Court, as noted, made explicit that its ruling did not embrace attempts to inculcate patriotism through reasoned discussion rather than compulsion. Further, we are certain that the Court did not mean to suggest that *any* enforced recitation in a school is beyond the powers of school officials; surely, the requirement that each student in a class memorize and recite a poem by a nineteenth century American poet, or the "eight times" table, would not implicate the fundamental values eloquently explicated in *Barnette*.

Thus, *Barnette* does not state an entire ruling body of law but rather a limiting principle of critical importance to, although far from dispositive of, this case—*viz.*, that the so-called "indoctrinative" function of a school does not sanction *any and all* means toward the goal of inculcating political, social, or moral values, even if those same means would be appropriate where the central educational functions of communicating knowledge and analytical methods are involved.

Similarly, the notion that books lack "tenure" is certainly true in one sense but, like the "indictrination" statement, in a more fundamental sense simply begs the question before the Court. Of course *books* have no "tenure", constitutional or otherwise—but that is because the First Amendment protects *people*, not books. Compare *Katz* v. *United States*, 399 U.S. 347, 351. And even as the "effort to decide whether a given 'area' . . . is 'constitutionally protected' deflect[ed] attention from the problem presented by" *Katz*, (*id.*), so the "tenure" slogan on which the School Board essentially predicates its case diverts attention from the true issue here—the scope of

the "First Amendment right [of the students] to 'receive information and ideas' " (*Kleindienst* v. *Mandel*, 408 U.S. 753, 762 and cases cited *id.* at 763). As the Court also said in *Kleindienst*: "This Court has recognized that this right is 'nowhere more vital' than in our schools and universities." *Id.* at 763.[2]

B

There is no doubt that if a municipality determined to bar from sale or distribution within its borders the books here at issue on the ground that the ideas conveyed were possibly offensive to some—or most—of its citizens the First Amendment would be violated. Where the government as regulator attempts to stifle the communication of ideas on the basis of the viewpoint taken by the speaker, the very core values underlying the First Amendment are implicated. "[A]bove all else, the First Amendment means that government has no power to

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[2] Again it is true, of course, that neither books nor, more aptly, the students whose access to them has been purposely impeded acquire any manner of *property* rights—the constitutionally significant aspect of the "tenure" concept—by the fact that those writings have been on the shelves for a day, a year, or five years. The procedural due process rights which pertain when, by beneficence or otherwise, the government creates a property interest (*see, e.g., Goldberg* v. *Kelly*, 397 U.S. 254; *Slochower* v. *Board of Education*, 350 U.S. 551; *cf. Board of Regents* v. *Roth*, 408 U.S. 564, 576-78), certainly have no application here. But the First Amendment restrains the Government's hand in removing government-bestowed benefits or opportunities from people even when there are *no* property rights in those benefits or opportunities. *E.g., Pickering* v. *Board of Education*, 391 U.S. 563; *Keyishian* v. *Board of Regents*, *supra*; *Shelton* v. *Tucker*, 364 U.S. 479. Since this is a First Amendment case it is therefore no answer to the questions raised here that shelved books as such lack property rights. Rather, the problem in this case is whether in the particular situation of purging books from school libraries because of their content, the First Amendment limits the power of school officials to systematically restrict access of the students to certain points of view.

restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 and cases cited *id.* The foregoing was most recently quoted approvingly in *Consolidated Edison* v. *Public Serv. Comm'n.*, 447 U.S. 530, 537. While this Court has in a few instances in recent years sanctioned limited government regulation of private expression based on its gross tastelessness (*Young* v. *American Mine Theaters*, 427 U.S. 50; *Pacifica Foundation, supra*), *Central Hudson's* reaffirmation of *Mosley* demonstrates that the Court has also remained absolutely steadfast in its insistence that suppression of communication because of disagreement with the ideas expressed has no place whatsoever in our constitutional scheme.

C

Governmental entities do not affect "the marketplace of ideas" solely in their role as regulators of private expression. Governments, and government officials, also communicate on their own behalf with members of the populace; for example, the United States publishes all manner of material for general distribution. Also, governments—federal, state and local—control property which, while not principally used for communicative activity is a natural focus for such activity. In regulating access to such property, the government necessarily affects the opportunity for communication. See *e.g.*, *Hague* v. *C.I.O.*, 307 U.S. 496; *Mosley, supra.* And finally, these governments often create and subsidize opportunities for communication between private individuals. By determining who may benefit from that opportunity, the government once again is affecting private individuals' ability to communicate. *E.g., Southeastern Promotions* v. *Conrad*, 420 U.S. 546 (municipal auditorium); *City of Madison* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167 (public meeting); *Widmar* v. *Vincent, supra* (university facilities).

The dominant point of the First Amendment is to prohibit government abridgements of the people's speech not to restrain government speech. That Amendment's free speech protection contains no equivalent of the Establishment Clause.[3] It could hardly be otherwise if the government and government officials are to take part in the national dialogue. Speech is not a random activity. The speaker to be coherent must make choices as to subject matter, point of view, emphasis and style at every juncture. A constitutional rule that when the government speaks it must do so without making such distinctions would be a gag rule.

For this case, the significance of the limits of the First Amendment's application (particularly application of its content, and its point-of-view, proscriptions) to the government-as-speaker is that the problem of school board control over prescribed classroom curriculum can be put to one side. For the most part, the role of the elected school officials in determining what students are to learn and teachers to teach appears analogous to other situations in which the government exercises a granted power to engage in communicative activity. The substantial differences which we can surmize and which may be of constitutional significance in some instances are: first, that the persons being addressed in elementary and secondary

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[3] This is not to say that other clauses of the Constitution may not limit the government as speaker. For example, we believe that the use of governmental funds or facilities to further one side in a partisan political context would implicate the Equal Protection Clause. *Cf. Buckley* v. *Valeo*, 424 U.S. 1, 97-99 where the Court treated in depth the contention that federal public financing of political elections and conventions violates the due process clause of the Fifth Amendment by excluding certain minor party candidates. The Thirteenth and Fourteenth amendments would provide an independent constitutional proscription against a government campaign in favor of discrimination against blacks. See *Anderson* v. *Martin*, 375 U.S. 399. There may also be instances in which the government's manner of communicating its views become so intrusive as to violate privacy interests protected by the First or Fifth Amendments. *Cf. Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 463-466.

schools are for the most part minors, so that situations of conflict with parental rights to raise their children could arise; and second, that attendance is compulsory, a circumstance which might raise constitutional questions if the curriculum prescribed bore little relationship to the general purposes which justify such a deprivation of child and parent liberty as compulsory school attendance represents. See e.g. *Meyer* v. *Nebraska*, 262 U.S. 390; *Pierce* v. *Sisters*; 268 U.S. 510; *Wisconsin* v. *Yoder*, 406 U.S. 205.[4]

The recognition that the First Amendment has a relatively restricted role to play with regard to government expression overall, and may therefore place few limits upon the particular form of government communication in the classroom envisioned by the communities of this nation when they create public schools, does not sanction everything schools do, in the name of education or otherwise. Rather, schools also provide the setting for communication among students, and among students and members of the outside community. For example, schools like universities, may provide facilities for student extracurricular activities and for meetings of, and performances by, members of the public. In fostering such communicative activities, school boards are performing an important and useful function but one that is different in kind from engaging directly in speech. See *Widmar*, *supra*.

It is our view that a school library is appropriately viewed as one aspect of this latter function. In estab-

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[4] Thus, if high school students were taught no mathematics, science, or history but were simply required to sit all day listening to patriotic speech, we would assume that the Due Process Clause, if not the First Amendment, would be violated. Like constitutional questions would be raised by the reported example of "a western state legislature, [which] exasperated by the pertinacity of mathematicians, once passed a law that *pi*, or the relation of the diameter to the circumference of the circle, should thereafter in the schools of the state be reckoned 3 1/7." Howard Mumford Jone (ed.) *Primer of Intellectual Freedom*, p. xi, (Cambridge, Mass., 1949). *See* discussion of *Barnette*, at p. —, *supra*.

lishing a library, a school is in effect providing a relatively unstructured means for students to engage in a form of communication with individuals, past and present, who have committed their thoughts to paper.[5] The question then becomes whether and, if so, within what parameters the First Amendment cabins a governmental entity engaged in such communication-fostering activity with respect to content discrimination generally and to point-of-view differentiation particularly.

D

The law regarding access to governmental facilities such as streets, and parks that are natural public forums but are not dedicated solely to communicative activity is well settled; *any* form of content discrimination is necessarily suspect and therefore subject to full First Amendment scrutiny. E.g. *Mosley, supra.* In making allocation decisions with respect to such locations the government ordinarily has no *legitimate* interest, relating to the proper functioning of the facility, in distinguishing among points of view, or, more generally, among issues or subject matter. And, while there *are* in such situations weighty governmental interests in preserving order, the very fact that the government has made content differentiations is usually sufficient to demonstrate that such interests are *not* at stake, since the expression permitted may be as likely to cause the harm supposedly addressed as that included in any proscription. Thus, the reasons why "[s]elective exclusions from a public forum may not be based on content alone and may not

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[5] One point of the libary may be to provide the resources that compliment and supplement the school's classroom curriculum. Certainly then in acquiring books such congruence is a factor fairly to be taken into account and we do not mean to imply otherwise. See also p. — *infra.* But a library is not the functional equivalent of a classroom in which a teacher meets with a class to canvass a stated subject and that subject alone and to do so in a manner permitting only one person at a time to be heard. For a storehouse of books permits a series of parallel intellectual efforts to be initiated at any moment, none of which interfere with the other.

be justified by reference to content alone" (*Mosley, supra.* 408 U.S. at 96), is that, upon analysis, the government has no different or greater interest in point-of-view or content differentiation in such circumstances then when it is regulating private speech directly.

The situation appears to us to be quite different with respect to communication-fostering governmental locations and occasions, a. to which the law is considerably less well developed. Initially a government entity may define the function or purpose of such a location or occasion in a way which *does* make some form of content differentiation appropriate if that function is to be served. For example, at public meetings, relevance to the subject matter of the meeting is surely an essential criteria if the meeting is to go forward in a rational fashion. *Cf. City of Madison, supra.* Also, it is the norm that scarcity of resources will necessitate that choices be made among competing publications, performances or displays. When this is the case the application of such content-oriented preferences as a concentration upon pre-1950 plays, a preference for scientific publications as opposed to musical ones, or a choice of a certain book rather than another because of the critical acclaim the former has received may well be perfectly in keeping with—indeed may well be essential to—the overall object of enhancing communication.

There is no reason to suppose that the Constitution requires a first-come, first-served approach to the use of scarce governmental resources in a communication-fostering endeavor even though attention to such considerations as relevance, quality, and community needs, would appear far more likely than not to improve the performance of the enterprise as a service to the populace. We therefore believe that there is no rigid proscription upon content based determinations generally by public libraries or by school libraries, for the result would be to undermine the ability to provide a community resource which is in itself an embodiment of the underlying values of the First Amendment.

Nor, as this Court has made clear, is there any reason to suppose that this mode of governmental activity is entirely free from the strictures of the First Amendment. *Southeastern Promotions, supra*, establishes the point we believe to be critical to the outcome of this case—where there is no showing that the particular decision under review that limits one form of expression was made to permit another form of expression, there is no basis for treating communication-fostering governmental activities in a special fashion. The *Southeastern Promotions* Court began:

> There was no contention by the Board that these facilities could not accommodate a production of [the] size [of the musical "Hair"] . . . petitioner was not seeking to use a facility primarily serving a competing use . . . nor was rejection of the application related to . . . . applications from other users. [420 U.S. at 555.]

Under these circumstances, the Court regarded the city's action in denying the application as "indistinguishable in its censoring effect from the official actions consistently identified as prior restraints in a long line of this Court's decisions." *Id.* at 552.[6]

We would apply the *Southeastern Promotions* mode analysis to this case as follows: As to libraries generally, and school libraries particularly, many types of content-based determinations are necessary to the proper functioning of the institution. For this reason, book selection decisions ought generally to be immune from

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[6] Similarly, in the *Widmar supra*, there was the possibility, noted by the concurrence, that competing applications for use of university facilities by student groups could justify content-based distinctions designed to foster the overall purposes of the university. 50 L.W. 4066-67 (Stevens, J. concurring). But it was clear that such considerations had not influenced the decision to deny use to the complaining group. *Id.* at 4064-4065. Consequently, the Court, citing *Mosley, supra*, applied the standard pertinent to the public forum situation. 50 L.W. at 4066.

the broad First Amendment proscription against subject-matter differentiation. Point-of-view discrimination, however, might call for a different result. At least in the public library situations, in which didactic purposes are not central, and possibly with respect to school libraries as well, acquisition policies which elevate a particular viewpoint into an orthodoxy and seek overall uniformity of doctrine within the library as whole, might, upon complete examination, be found to be unjustified by any sufficient governmental interest. Even as to such discrimination, however, judicial intervention should be limited; otherwise censorship of another sort could be introduced, as librarians and other decision makers submerge their own best judgment to the fear of litigation.

Removal of a shelved book because its content is deemed objectionable, however, does *not* implicate the special considerations commanding that communication-fostering governmental entities be permitted to engage in content-based differentiation. There may be nothing in the circumstances suggesting the need for any decision about particular books whatever, content-based, viewpoint based, or otherwise. And, the removal may turn out to be, as it was alleged to be in this case, for the precise purpose of discouraging communication between the students and certain authors because the authors' ideas are out of favor with the authorities. At that juncture, we believe the action becomes "indistinguishable in its censoring effect from the official actions consistently identified as prior restraints . . ." (*Southeast Promotions, supra*, 420 U.S. at 552) and therefore as violative of the First Amendment.

## CONCLUSION

As we noted at the outset, the sole issue before this Court is whether the actions of school officials in removing books from libraries are free of all First Amendment restraints. For the reasons we have developed,

we believe that there are First Amendment restrictions upon such action, although the precise perameters of such restrictions remain to be developed. Consequently, the judgment of the court of appeals must be affirmed and the case remanded for trial. After that trial will be the appropriate time for the elaboration of more precise constitutional rules.

Respectfully submitted,

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